Appeal No. UKEAT/0123/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 30 November 2018

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR M S RADIA	APPELLANT
JEFFERIES INTERNATIONAL LIMITED	RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

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APPEARANCES

For the Appellant	MR DANIEL TATTON-BROWN QC (of Counsel) Instructed by: Radcliffes LeBrasseur 85 Fleet Street London EC4Y 1AE
For the Respondent	MR SEAN JONES QC (of Counsel) Instructed by: Herbert Smith Freehills LLP Exchange House Primrose Street London EC2A 2EG MS JUDY STONE (of Counsel) MS SIAN MCKINLEY (Employed Barrister)

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL – Procedural fairness/automatically unfair dismissal

The Appellant appealed against a decision of the Employment Tribunal ("the ET") that his dismissal was not unfair. He was dismissed on the basis that findings in an earlier decision by an Employment Tribunal ("ET1") about his credibility meant that the Respondent could no longer employ him. He argued first, that the ET had erred in law by holding that the Respondent was entitled to dismiss him without any investigation, apart from giving him an opportunity to comment on ET1's findings at a disciplinary hearing. The Employment Appeal Tribunal ("the EAT") dismissed that ground of appeal. He argued, second, that the ET had erred in law in holding that the Respondent's failure to give him an appeal hearing did not make the dismissal unfair as it would not have made any difference. The EAT allowed that ground of appeal.

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THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

1. This is an appeal from the Judgment of the Employment Tribunal ("the ET") sitting at London (Central). The ET consisted of Employment Judge Henderson, Mr R Lucking and Mr S Godecharle ("the second ET"). The Judgment was sent to the parties on 14 November 2017 ("Judgment 2").

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2. Two Judgments of the ET are relevant to this appeal; Judgment 2 and a Judgment sent to the parties on 3 February 2017, ("Judgment 1"). That was a Judgment of the ET sitting at London (Central). The ET consisted then of the Employment Judge Baty, Mrs C I Ihnatowicz and Mr D Carter ("the first ET"). In Judgment 2, the ET dismissed the Claimant's claims for automatically unfair dismissal pursuant to section 103A of the **Employment Rights Act 1996** ("the ERA"), victimisation, detriments arising from a protected disclosure and for unfair dismissal pursuant to section 98 of the **ERA**.

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3. I will refer to the parties as they were below. Paragraph references are to Judgment 1 or Judgment 2 as the case may be unless we say otherwise. On this appeal, the Claimant was represented by Mr Tatton-Brown of Queen's Counsel. The Respondent was represented by Mr Jones of Queen's Counsel and Ms Stone. We are grateful to counsel for their written and oral submissions.

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The Facts

4. The relevant facts can be stated shortly. The Respondent is regulated by the Financial Conduct Authority ("the FCA"). The Respondent is governed by the Financial Conduct Rules.

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The Claimant was employed by the Respondent between 21 June 2006 and 6 March 2017, initially as an Equity Research Analyst.

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5. He became Managing Director at the end of 2009. His job is what is known as a regulated position. In May 2015, he brought his first ET claim against the Respondent. It was a claim of disability discrimination. It was heard over seven days in November 2016.

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6. In Judgment 1, the first ET dismissed the Claimant's claims. The first ET made adverse findings about the Claimant's credibility and it may be convenient if we refer to those now. The ET found that the Claimant's evidence was "not credible in many respects" and "on lots of

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occasions evasive" and that he had not told the truth or had misled the first ET in a number of respects. That was of "grave concern", as the Claimant was a regulated person.

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7. The first ET gave four examples. 1) He gave evidence about his weight on his discharge from hospital which was "clearly an untruth". 2) He admitted that his evidence about his holiday in Mexico was "misleading" (he had said he had been forced to miss his holiday). In fact, he had only missed the first four days and had extended his holiday so that it was as long as he had

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wanted it to be. It was misleading to claim that he had only joined his family for the "last few days" of his holiday, when in fact he had joined for a matter of weeks. 3) He gave "untrue evidence" to the ET about the length of his absence for his knee injury. The ET compared the

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evidence in his witness statement (a short absence followed by return to work on crutches and "quickly" slipping back into a normal routine) with his initial evidence, that he was absent for a third of a year. The ET described this as "a considerable exaggeration." 4) His evidence at the first ET about when he found out that he was disabled "could not have been true."

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8. The Claimant brought a second claim for victimisation in September 2016. The Claimant was still employed by the Respondent when Judgment 1 was sent to the parties. The Respondent dismissed him for gross misconduct on 6 March 2017, because of the credibility findings in Judgment 1. The Respondent decided that those findings meant that the claim could not be seen as a fit and proper person in accordance with the FCA's Handbook.

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9. The Claimant then issued a third claim in the ET. He complained that his suspension (on full pay), dismissal, and the Respondent's refusal to hold the Hearing of his appeal against his dismissal amounted to whistleblowing detriment, victimisation and unfair dismissal. At paragraph 5 of Judgment 2, the second ET listed, uncontroversially, the issues it had to decide. It was agreed that the Claimant had made a protected act by presenting the first claim (that the Claimant's communication with the FCA on or about 28 September 2016 was a protected disclosure, and that the Claimant's suspension and the Respondent's refusal to hold an Appeal Hearing where potential detriments).

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10. In paragraph 7 and 8, the second ET summarised the relevant findings in Judgment 1. In paragraph 7, the second ET recorded that the ET had found in Judgment 1 that "in several areas of his evidence the Claimant had not told the truth or had misled the first Tribunal and had given untrue evidence." In addition, the first ET had also noted that "the Claimant's behaviour as a regulated person would be a matter of grave concern."

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11. The first ET had gone on to say that they found the Respondent's witnesses to be credible and honest. Where there had been any disputes about various events, their credibility assessment had led them to prefer the Respondent's evidence to that of the Claimant. In paragraph 8, the

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second ET said that it had told the parties at the start of the Hearing that it would only hear evidence which was relevant to deciding the issues.

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12. The purpose of the Hearing was not to re-examine or to overturn the first ET's findings of fact or credibility. The Claimant had not appealed Judgment 1 or applied for its reconsideration. It was not for the second ET to reopen Judgment 1.

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13. The Claimant acknowledged this in paragraph 93 of his witness statement but "nevertheless elaborated at great length why the first Tribunal had misunderstood his evidence and statements at the Hearing in November 2016, and wrongly concluded that he had been

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untruthful or misleading…". In paragraphs 9 to 12, the ET summarised the Claimant's arguments on estoppel and abuse of process. The Claimant argued that the Respondent could not rely on the first ET's findings, or should exercise extreme caution about them.

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14. The Claimant also argued that the second ET was not estopped from reconsidering the findings of the first ET. The second ET, having enquired with "unrelenting severity, whether the determination which it sought to find the estoppel was so fundamental to the substantive Decision

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that the latter cannot stand with the former" found that "their findings on the Claimant's credibility and their observations on the manner in which he gave evidence were fundamental to their Decision to dismiss all his claims."

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15. The final Decision depended on the first ET's findings on credibility which affected their findings of fact and their conclusion; if there was not technically an issue estoppel, an attack on

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the first ET's credibility findings would be an abuse of process. The Claimant had been legally advised throughout. He had not appealed or applied for reconsideration of the first ET's

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Judgment. The second Hearing "cannot and must not be used as an appeal "through the back door", as it were." (paragraph 11).

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16. The ET heard evidence over three and a half days. Most of that related to the Claimant's attempts to challenge first ET's assessment of his credibility. The ET recorded that the Respondent had received the Judgment of the first ET on 6 February 2017. On 7 February 2017, the Respondent wrote to the Claimant suspending him pending a disciplinary investigation (see

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paragraph 180).

17. In that letter, as Mr Tatton-Brown accepted, the Respondent correctly summarised the

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ET's findings. The suspension letter explained that the basis for the disciplinary hearing was the first ET's findings about the Claimant's credibility. The letter said that no assumption had been made that the Claimant was guilty of misconduct. The Respondent was obliged to tell the FCA that it had suspended the Claimant and why.

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18. The Respondent wrote again to the Claimant on 28 February 2017. The allegation against the Claimant was that he had "materially and fundamentally breached" his contract of

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employment "by acting dishonestly" because he had either not told the truth or had misled the Respondent in the first ET in a number of respects. That letter is at page 182.

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19. It is apparent from that formulation that the Respondent equated dishonesty with the first ET's findings. It is also apparent from the documents, see page 188 of the bundle that the Claimant understood that what was being made was an allegation of dishonesty. In addition, rather than suggesting that it was not correct to characterise the ET's findings as findings of

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dishonesty, he sought instead, in the course of the disciplinary proceedings, to say that he had not given untruthful or misleading evidence.

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20. Although the letter referred to "internal investigations," the Respondent in fact had decided not to investigate (see paragraph 52). The Respondent relied on the ET's findings. There were no further investigations to do, and none were done.

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21. In a letter dated 22nd of 2017, which is appended to Mr Tatton-Brown's skeleton argument, the Claimant asked, at least by implication, to be involved in an investigation. There was a Disciplinary Hearing on 21 February 2017 (paragraph 33). Mr Tucker dealt with it. He

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did not know the Claimant very well but knew that he had brought an ET claim and had made various complaints against the Respondent.

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22. The first ET's findings had been reported in the press on or about 7 or 8 February 2017. Mr Tucker had not been formally trained but had conducted complicated Disciplinary Hearing in 2013. He understood the key principles.

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23. The second ET accepted his evidence that he was open to the idea that the ET Judges might have made mistakes, and that he was prepared to hear what the Claimant had to say about the first ET's findings, and to see if he could satisfy himself that the first ET's comments had

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been justified. The ET's acceptance of his evidence on this point is a significant finding by the ET.

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24. Mr Tucker said at the Hearing on 23 February 2017 that the Respondent had not investigated and the ET's findings were the starting point. The Hearing was the Claimant's

opportunity to discuss those findings (see paragraph 34). Mr Tucker read out the relevant passage of the Judgment. He gave the Claimant an opportunity to comment. The Claimant replied at length.

25. He believed that his evidence had been misunderstood. His focus was on the four examples given by the first ET; paragraph 35. His case was that he had been honest about each of them. The first ET had misunderstood or had misinterpreted his evidence. The first ET, he said, had copied their findings from the Respondent's submissions rather than looking at his honest and accurate statements.

26. The Claimant accepted, at the second Hearing, that Mr Tucker had given him a full opportunity to raise any issues he wanted to raise at the Disciplinary Hearing (see paragraph 36). This, too, is a significant finding by the ET.

27. The Claimant produced written submissions after the Hearing. These prompted Mr Tucker to ask for further written material after the Hearing. He looked at the Respondent's solicitor's transcripts of the evidence at the first ET on the four topics. He did not realise and the ET held that he had not been unreasonable in not realising that the Claimant's solicitors had also prepared transcripts of the Hearings.

28. In any event, the second ET found that there were no material discrepancies between the two transcripts (see paragraph 40). Mr Tucker found that the first ET's findings were correct in the light of the transcript. He was not intending to re-open "the first Tribunal Hearing as such" and the Claimant's comments did not show that the first ET's findings had been "unreasonable or unfair" (see paragraph 39).

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29. Mr Tucker told the second ET that while he had discussed the drafting of the disciplinary Decision with an in-house lawyer, the Decision was his alone. The ET accepted that evidence (see paragraph 41). The second ET made a specific finding that the outcome of the Hearing had not been prejudged (see paragraph 42).

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30. The Claimant was dismissed by letter dated 6 March 2017 (page 211) of the bundle. Mr Tucker said in the letter that the starting point was that an independent ET had found that the Claimant's evidence was not credible and that he had either "lied" or "misled" the ET in his evidence. Mr Tucker had the ET's overall findings in mind.

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31. Mr Tucker had to consider whether the Claimant's behaviour was consistent with his continuing work as an analyst, which required a high degree of honesty and probity and with registration with the FCA. Mr Tucker referred to the FCA Handbook and to the definition of "fit and proper person." The relevant authorised person assessing staff should consider all relevant matters including whether a person has been "criticised by a Court or Tribunal or whether publicly or privately" (see Rule 2.1.3D (10) of the relevant part of the FCA Handbook).

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32. Mr Tucker considered the four points made by the Claimant. Mr Tucker concluded that the ET had been reasonable in deciding that the first three were examples of the Claimant's lack of credibility. The fourth topic, that is when the Claimant had become aware that he was disabled was "ambiguous." Mr Tucker did not decide that first ET's findings on that topic could be justified (see paragraph 49).

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33. Mr Tucker said that the Respondent did not accept the Claimant's allegations that his suspension and the disciplinary action were a consequence of the Claimant's protected disclosure.

They flowed from the first ET's findings and nothing else. He rejected a suggestion that the Claimant had been threatened in his 2016 performance review (see paragraphs 50 and 51).

34. In his written submissions after the disciplinary procedure Hearing, the Claimant said that he wanted to appeal the first ET's Decision. Mr Tucker did not think that it was appropriate for the Respondent to wait for that. In any event, the Claimant did not appeal (see paragraph 53).

35. Mr Tucker's conclusion was that the Claimant's comments did not make any difference to the first ET's assessment of the Claimant's credibility. Bearing that in mind, Mr Tucker decided that the Claimant's behaviour was gross misconduct and that it was incompatible with his continued employment by the Respondent, particularly because the Claimant was in a regulated position.

36. His behaviour was "not compatible with his being a fit and proper person for the purposes of the FCA rules." He could not agree to the Claimant being employed in a different position. The Claimant was dismissed with immediate effect and given a right of appeal (see paragraph 54).

37. In paragraph 55, the ET found that there was no evidence that Mr Tucker was influenced by any of the other managers or motivated by the Claimant's protected disclosures. The starting point for his Decision was the first ET's findings on credibility. The Claimant was given an opportunity to put those findings in context.

38. Mr Tucker did not conclude that the first ET had been incorrect or unfair in their overall findings. Mr Tucker bore in mind that the Claimant was a regulated person (paragraph 55). At

paragraphs 56 to 60 the ET dealt with the findings of the first ET about the weight figures in an expert report by Professor Marks. The Claimant had emphasised these in his written submissions after the Disciplinary Hearing and in his evidence to the secondary ET.

39. The question was whether he had told Professor Marks that he weighed 50kgs at the end of his treatment. The first ET said that that was the Claimant's evidence and that it was the evidence of Professor Marks that the Claimant had told him that (see paragraph 27).

40. The Claimant had contacted Professor Marks during the discipline proceedings. Professor Mark was travelling then. He thought he still had his notes of his consultation with the Claimant. The first ET would not let Professor Marks produce those notes. The Claimant argued that if the first ET had seen the notes they would have understood the Claimant's evidence in context and would not have made their adverse findings on his credibility (paragraph 58).

41. The second ET did see Professor Marks's notes. These appear to show that Professor Marks had recorded that the Claimant had told him that he had lost 45kgs in weight, from 95kgs to 50kgs. That was consistent with the first ET's findings on credibility (see paragraph 59). The Claimant told the second ET that he did not have Professor Marks's notes at the time of the Disciplinary Hearing. He did not get them until about 20 March 2017 (see paragraph 60).

42. The Claimant lodged a written appeal (see pages 216 to 19 of the bundle). He complained that Mr Tucker had relied on his own solicitor's transcripts of the ET Hearing which he had not been shown. This, the ET held, did not prejudice the Claimant (see paragraph 61).

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43. The Claimant also complained that Mr Tucker had only looked at extracts from the transcripts and not at the full transcript. He did this because the Claimant had relied on the four topics which the ET had chosen as examples of the Claimant's conduct. The Claimant complained that there were no witness statements or evidence.

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44. The ET said it was not clear what the Claimant meant by that. Mr Tucker did not, in making his Decision to dismiss, rely on any such statements (see paragraph 62). The Claimant repeated his comments about the three other examples. The appeal document did not say that the Claimant had contacted Professor Marks about his notes, although the Claimant knew that he was waiting for those documents from Professor Marks. There was nothing new in the appeal document or different from the submissions that had already been relied on (see paragraph 63). Mr Jones emphasised that finding in his submissions to us.

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45. It was agreed that Mr Cronin had considered the appeal and that he had not held a Hearing. He reviewed the documents and Mr Tucker's Decision. The Claimant had three points. He was told at first that there would be an investigation. He was then told that there would be no investigation. Mr Tucker then reviewed some "cherry-picked notes" in reaching his Decision. Third, the Claimant was not provided with witness statements or witness evidence.

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46. Mr Cronin decided that the Respondent had investigated appropriately in the circumstances. Given the nature of the first ET's findings there were no witnesses to interview. The Claimant challenged the accuracy of some of the first ET's findings of fact and had chosen which points he wanted to make.

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47. Mr Tucker had reviewed the Respondent's solicitor's transcript of the relevant part of the first ET's Hearing. Mr Tucker had been guided in his choice of extract by the Claimant's selection of points. The Claimant had access to his own solicitor's notes and had been given the Respondent's solicitor's notes after the dismissal Decision. Mr Cronin found that there was no unfairness in this. The second ET agreed (see paragraph 66).

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48. The ET said, "This Tribunal have found as a matter of fact that the two transcripts do not vary in any material regard. Mr Cronin therefore concluded there was no unfairness in this process. We agree with his conclusion." This it seems to us is a significant finding.

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49. Mr Cronin also considered the Claimant's submission that it was unfair to dismiss him on the basis of the first ET's findings about his credibility, given that the Respondent had approached defending the claims by challenging the Claimant's credibility. Mr Cronin found that it was open to the Respondent to defend itself as it saw fit. The Claimant had been under a duty to give honest evidence and the first ET had found that he had not done so. The Claimant could not then criticise the Respondent for challenging his credibility (see paragraph 67).

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50. Mr Cronin then considered the three remaining issues. Mr Cronin explained why the Respondent did not think that the first ET's findings were incorrect. Mr Cronin also considered the Claimant's submission that the Respondent had jumped at the first opportunity to dismiss him because he had made a disability discrimination claim and a disclosure to the FCA. Mr Cronin had found no evidence that that was so. He had not been motivated by such matters.

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51. Mr Cronin repeated Mr Tucker's concerns about whether the Claimant was a fit and proper person in the light of the ET's credibility findings (see paragraphs 68 and 69). In

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paragraph 70, the second ET made its own observations about the Claimant's evidence at the Hearing in October 2017.

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52. The second ET said he had frequently failed to answer questions. He would frequently contradict in an answer to a subsequent question to an answer which he had given to an earlier question. This was time-consuming and confusing. It might not have been intentional but the second ET specifically drew it to the Claimant's attention. These factors meant that the

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Claimant's evidence was often unclear and apparently contradictory. That affected the ET's ability to rely on the Claimant's evidence with any confidence.

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53. The ET said it heard no evidence to connect the protected disclosure with the Claimant's dismissal. The Respondent had known about it since 4 November 2016. There had been no change to his position at work, on the Claimant's own evidence. His relationship with Mr Taylor had not been substantially affected. He continued to receive bonuses.

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54. There was no disciplinary action until after the Decision of the first ET in February 2017, indicating that that, and not the protected disclosure, was the motive for his dismissal (see

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paragraph 72). Nor did the ET hear any evidence which supported the claim that the Claimant had been dismissed for bringing the first ET claim on 27 May 2015. Similar reasoning applied (see paragraph 73).

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55. Even though the Respondent did not think that the Claimant had been wholly honest in his evidence at the first Hearing and though they knew that the Claimant had contacted the FCA, the Respondent took no disciplinary action against the Claimant until it had received the first

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ET's findings in February 2017 (see paragraph 74). The ET decided that the Respondent believed

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that the Claimant was guilty of misconduct. The Respondent had the first ET's findings and Mr Tucker had heard and considered the Claimant's arguments that the first ET had misunderstood his evidence.

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56. Mr Tucker decided that the Claimant had not shown that the first ET's findings were not justified. Mr Tucker was satisfied that there had been no "miscarriage of justice" (see paragraph 75). The Respondent had reasonable grounds for that belief, the ET held. The ET explained why in paragraph 76. They relied on Mr Tucker's reasoning.

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57. Mr Tucker allowed the Claimant to defend himself and put the first ET's findings in context. The Claimant accepted that he had been allowed to say what he wanted at the Disciplinary Hearing (see paragraph 76). This is another significant finding, we consider.

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58. The ET also decided the Respondent had carried out a reasonable investigation in the circumstances. There has been no investigation "as such." Given the Respondent's belief in the Claimant's misconduct was based on the ET's findings, the investigation which could be done was limited. The Respondent gave the Claimant the opportunity to explain and to put forward his point of view and to put the ET's findings in context. That was the purpose of the Disciplinary Hearing.

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59. Mr Tucker confirmed that he had no intention of reopening the first ET's findings but he did accept that the Claimant should have an opportunity to explain himself. The second ET did not find anything sinister in Mr Tucker's language. He had not tried to prejudge the issue.

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60. We also consider that the findings in paragraph 77 are significant, in particular the findings about the investigation. In paragraphs 78 to 81, the ET considered whether the Respondent have acted reasonably in dismissing the Claimant by asking whether the dismissal was within the range of reasonable responses. It was, having regard to the FCA rules, the Respondent's regulated status and the requirement that Claimant be an approved person (see paragraph 78).

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61. The ET then turned to the question of the appeal. It said that that issue had not been raised in the list of issues (see paragraph 80). The ET then said that it was "wholly irregular" for the Respondent not to have given an Appeal Hearing to the Claimant. The ET said it was contrary to best practice, contrary to the Respondent's own procedure and contrary to the Acas Code of Practice ("the Code"). We record that, in that respect, Mr Jones submitted that the ET may have put matters too high; but equally he did not challenge that way of putting it. The ET found, nonetheless, that "unusually holding such an appeal would not have made any difference" (see paragraph 79).

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62. The Claimant, the second ET recorded, had been asked during the Hearing what he would have said at an Appeal Hearing. The ET recorded that at first, he said that the main points had been covered in his written submissions but that he would have included Professor Marks's notes. In re-examination on the same question, the Claimant said he would have submitted much more detailed written submissions and would have annotated Professor Marks's notes to show what has happened and how the first ET findings were wrong.

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63. This was another example, the second ET said, of the Claimant giving inconsistent answers. The Claimant had not specified any further detail. In any event, the ET said Professor

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Marks's notes did not support the Claimant. They would not have helped even if he had had an Appeal Hearing (see paragraph 80).

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64. The Claimant had received Professor Marks's notes before Mr Cronin set out the result of the appeal but had not sent them to Mr Cronin in order to allow Mr Cronin to consider them before reaching his Decision. The Claimant chose not to do that, "therefore, the Tribunal does not find that the failure to hold an Appeal Hearing rendered the dismissal unfair" (see paragraph 81).

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65. At paragraph 82, the second ET repeated its findings about the notice for the Claimant suspension. Suspension had not been an unreasonable step in the circumstances. There was a genuine explanation for the suspension, which was not the protected disclosure. Mr Cronin had not held an Appeal Hearing because he considered he had all the evidence he needed.

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66. The Respondent did not fail to hold such a Hearing because of the protected disclosure. There was an adequate explanation which was not connected with the Claimant's protected disclosure (see paragraph 82). The second ET considered and rejected the victimisation claim in paragraph 83. It explained why.

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The grounds of appeal

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67. There were 17 grounds of appeal initially. They were considered on the papers by Her Honour Judge Eady QC. She decided that none raised an arguable point of law in relation to the Decision of the second ET. There was then a Hearing under Rule 3(10) of the **Employment Appeal Tribunal Procedure Rules 1993,** on 15 May 2013.

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68. His Honour Judge Richardson considered that ground 3 and the first lines of ground 8.3 raised arguable points of law. He ordered that no further action be taken on the other grounds of appeal. Ground 3 is that the ET erred in law in finding that it was reasonable to rely on the findings of the first ET and that the findings meant that there were no further investigations which could be carried out.

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69. The first part of ground 8.3 is that the second ET erred in law in holding that the failure to hold an appeal did not make the dismissal unfair. His Honour Judge Richardson said that the first ET had not used the word "dishonest" and the Claimant had not accepted that he was dishonest. However, whether or not he was dishonest or was at the heart of any decision to dismiss, it was arguable that that should have been addressed at the investigatory stage and not left to be teased out at the Disciplinary Hearing.

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70. In asking whether an Appeal Hearing would have made a difference, the first ET did not apply the correct test. The ET was arguably wrong to use hindsight but it was arguable that the second ET should have asked whether the Respondent could reasonably have believed that an Appeal Hearing was futile.

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71. Finally, His Honour Judge Richardson noted that there was a potential point about the scope of any remission should the unfair dismissal claim succeed.

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72. Mr Tatton-Brown argues that there is a conceptual difference between an investigation and a Disciplinary Hearing. That is why paragraph 6 of the Code recommends that if possible different people should conduct them.

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73. The Code indicates that the purpose of the investigation is to establish the facts. The purpose of the Hearing is to enable an employee to put his or her case, having been told what the problem is. He made a point, which he fairly conceded was a jury point, that the Respondent had not only not had an investigation but had falsely claimed at an early stage that it had investigated.

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74. He accepted that the first ET held in its Judgment that no investigation was required. He placed particular emphasis in his oral submissions, as well as in his written submissions, on paragraph 32 of the ET's Decision, to which we have already referred. In that paragraph, the ET said that the Respondent was relying on the ET's findings, which were the starting point so there were no further investigations which could be carried out.

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75. That is at an earlier stage. Later on in the proceedings in paragraph 77, the ET returned to the question of investigation in the terms to which we have already referred. It does seem to us that what the ET says about investigation in paragraph 32 cannot be read in isolation but must be read also with paragraph 77 in mind.

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76. Mr Tatton-Brown submitted that there were matters to be investigated. For example, he laid great emphasis on the fact that the ET had not found in its Decision that the Claimant had been dishonest. The word dishonest had not been used. This is a point that was made by His Honour Judge Richardson when he considered the case at the Rule 3(10) Hearing.

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77. He made points about the status of the first ET's findings. He said that they were persuasive but not binding and that, unlike the first ET, which had a merely adjudicative role, the Respondent should have investigated. He submitted that the second ET's failure to recognise their role was reflected in their approach to the findings of the first ET. He submitted that there

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was no abuse of process and the Claimant maintained that the Respondent should have investigated whether or not the Claimant had lied. He could only appeal on the point of law and an appeal on that point would have had little prospect of success.

78. Dealing with paragraph 77 of the second ET's Decision, he said that the finding that the Respondent had given the Claimant an opportunity to explain himself failed to recognise the difference between an investigation to establish the facts and a Hearing at which the employee has had a chance to explain himself. In support of the second ground of appeal, he argued that the ET had erred in law in holding that the dismissal was not unfair because an appeal would have made no difference. He drew our attention in his written submissions to the well-known Decision of House of Lords in **Polkey v A.E. Dayton Services Ltd** [1988] AC 344 at 358f, 364-5 and 364f:

> **"If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by section 57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken."**

79. The ET had not found that the Respondent had reasonably concluded that an Appeal Hearing had been futile and the Respondent could not have known what else the Claimant might have said at the Hearing.

80. In writing, the Respondent argued that the cases established six relevant principles.

1) The ET should focus on the statutory test and consider the substance of the entire disciplinary process. It should consider the procedure and the reason for dismissal and decide whether in the circumstances the employer acted reasonably in treating the reason for dismissal as the main reason for dismissing the employee; see **Taylor v OCS Group** [2006] ICR 1602 at paragraph 43 and 48.

2) The range of reasonable responses test applies to substance and to procedure; see **Turner v East Midlands Trains** [2013] ICR 525 at paragraph 17.

3) Decisions about reasonableness are, subject to an express misdirection or perversity, findings of fact **Bowater v Northwest London Hospitals NHS Trust** [2011] EWCA Civ 63 at paragraph 19.

4) The failure to follow the Code or an internal procedure is relevant but not decisive.

5) An ET errs in law if it finds that it was unfair not to carry out a procedural step but that that failure would have made no difference. It is quite different for the ET to find that there was no unfairness because the procedural step was pointless. The Respondent refers to passages to that effect in the speeches of Lord Mackay and Lord Bridge in **Polkey** at pages 153 and at paragraph 28.

The Respondent gave two further examples, **West Midlands Co-operative Society Ltd v Tipton** [1986] ICR 192 at 548E and **Westminster City Council v Cabaj** [1996] ICR 960 at page 971C to D. In the first, Lord Bridge said that an employer can reasonably refuse to entertain domestic appeal at all on the grounds that it would be pointless. In the second, the Court of Appeal said that a relevant factor for an ET deciding whether an employer acted reasonably is whether the employer actually considered, or a reasonable employer would have considered, at the time of dismissal, that it would be futile to follow an agreed procedure. A failure to follow a provision in the contractual disciplinary procedure might but did not inevitably make a dismissal unfair.

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6) On appeal, Courts should not subject ET Decisions to minute or overcritical analysis (**Hewage v Grampian Health Board** [2013] UKSC 54 at paragraph 26). The essential submission from the Respondent is that the second ET held in paragraph 77 that the investigation was within the range of reasonable responses.

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81. The Respondent elaborated the sixth point in three ways. First, Mr Jones submitted that this ground of appeal was semantic. The concept of investigation can include any investigation before the Disciplinary Hearing and what is uncovered at the Disciplinary Hearing itself. The ET's findings about the extent of the investigation which was reasonable before the Disciplinary Hearing depended on the misconduct which was being investigated.

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82. Second, the relevant misconduct was the first ET's findings and there was nothing more to investigate before the Respondent heard from the Claimant (see paragraph 77). Mr Tucker did some work after the Disciplinary Hearing, which the ET was entitled to describe the investigation (see paragraphs 38 to 49). This interpretation is supported by the phrase "as such" in paragraphs 32 and 77. The conclusion at paragraph 78 is a straightforward application of the authorities on which the Respondent relies. It discloses no error of law.

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83. Third, it was submitted in writing that the ET found that Mr Cronin did not hold an appeal because he "…considered that he had all the evidence he needed to consider the appeal…" (see paragraph 64). The ET had to consider whether the Claimant was denied an opportunity of showing that the employer's real reason for dismissal could not reasonably be treated as a sufficient reason for dismissing him. Mr Jones in his oral submissions referred to this as "the **Tipton** opportunity."

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84. An ET is entitled to find in an appropriate case that an employer acts within the range of reasonable responses where an employer considers that a particular step is futile and therefore not necessary. The finding in paragraph 81, which the Claimant criticises, is not wrong in law, because the second ET decided that an appeal on the papers was within the range of reasonable responses, not that it was outside that range, but that it would have made no difference. The finding is in the section of the Judgment headed "Was the dismissal within the range of reasonable responses open to the Respondent" and made in the context of Mr Cronin's Decision that he had all the evidence which he needed.

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<u>Discussion</u>

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85. We have described the ET's Decision and the parties' submissions in some detail. We can therefore state our conclusions relatively briefly. We deal first with the first ground of appeal that was permitted to be argued by His Honour Judge Richardson as a result of the Rule 3(10) Hearing.

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86. It seems to us that the Claimant's arguments on this point are based on at least one misconception. The first is that it matters whether or not the ET expressly found that the Claimant lied and was dishonest. The reason why the Respondent dismissed the Claimant, the ET found, was the findings of ET about the Claimant's credibility (see paragraph 74 and the heading of paragraph 74).

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87. It is true that the first ET did not use the words 'dishonest' or 'lie', but that does not help the Claimant, in our Judgment. The ET found that his evidence was not credible in many respects, and on lots of occasions evasive. We have already set out the four examples which the ET gave and the ET's findings that that was of grave concern because the Claimant was a regulated person.

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88. Those findings on any view were very damaging to the Claimant whether or not they amounted to findings of deliberate dishonesty. Except to the extent that we are about to mention, the Respondent did not embellish the findings of the first ET nor did the ET. Those findings are not different or implicit findings about the reason for the Claimant's dismissal.

89. In any event, the Claimant knew as soon as he got the second letter from the Respondent not only that the Respondent was relying on the ET's credibility findings, but that the Respondent further characterised those findings as findings of dishonesty. The Claimant, knowing that, did not challenge that characterisation by the Respondent of the first ET's findings. Instead, he disputed that his evidence to the first ET has been untruthful in any way.

90. Given that those findings were the reason for the dismissal, the second ET's finding that the Respondent acted reasonably in treating them as a starting point without further investigation at that stage and then seeking the Claimant's representations about those findings was, it seems to us, a finding that was open to the second ET (see the specific findings in paragraph 66). The lay members feel that this was not the best possible procedure which could have been adopted by the Respondent in the circumstances, and that there are many good reasons why it is better to have a separate investigatory and disciplinary stage. However, the question for us is not what we consider the best procedure would have been but whether it was open to this ET to find that the procedure which was in fact adopted by the Respondent was within the range of reasonable responses.

91. On the facts of this case, it is our view that the second ET did not err in law in Mr Tatton-Brown's phrase, by eliding in the investigatory and disciplinary stages. Those two stages are not part of the statutory test, nor, indeed, are they required by the Code. The question rather is

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whether the Respondent acted reasonably as a matter of substance in treating the findings as a sufficient reason for dismissal in the light of the explanations which the Claimant had given for those findings.

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92. It was open to the ET, in our judgement, to find in effect that there was no further investigation which the Respondent could have reasonably been required to conduct before it heard from the Claimant, as the findings spoke for themselves. For those Reasons, we dismiss the first of the grounds of appeal.

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93. We turn then to the second ground of appeal, which concerns the ET's reasoning on the internal appeal. We do consider that the ET erred in law in its approach to the appeal. The ET was very much alive to the significance of the internal appeal. We have already described the critical findings which it made about the failure to give a Hearing in paragraph 79 of the Judgment.

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94. It described the failure to give a Hearing as wholly irregular, contrary to best practice, a breach of the Acas Code and contrary to the Respondent's own appeal process. We do not say that it would not have been open to this ET, correctly directing itself in law, to have held that the dismissal was not unfair, despite the fact that the Respondent did not hold an Appeal Hearing.

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95. However, on the basis of the authorities to which Mr Jones referred, it seems to us that the ET did not make the findings that were necessary to make such a conclusion good. Not only did they not make the findings that were necessary to make such a conclusion good, their approach to this issue, as appears from paragraphs 80 to 81 of the Judgment, drives us to the conclusion that in its approach to this part of the case, the ET erred in law.

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96. Its summary of why it exonerated the Respondent is the last sentence of paragraph 79, "However, the Tribunal finds that, unusually, holding such an appeal would not have made any difference." The intuition that the ET had gone wrong in this sentence is reinforced by the reasoning that is set out in paragraphs 80 and 81. In those paragraphs, the ET considered the evidence which the Claimant gave to the ET.

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97. The ET investigated, and recorded the fruits of its investigation of what would have happened if an Appeal Hearing had been held. It seems to us that there is no ambiguity about what the ET were doing in paragraphs 80 and 81. What they did in those paragraphs supports our view that they erred in law in the last sentence of paragraph 79.

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98. That view is further supported by the last sentence of paragraph 81 where the ET sum things up by saying, "Therefore, the Tribunal does not find that the failure to hold an appeal hearing rendered the dismissal unfair." In the light of that clear and unambiguous reasoning and in the light of the absence of the findings that would have been necessary to support an alternative approach, our conclusion is that this ground of appeal succeeds. We therefore allow the Claimant's appeal.

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